



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation on October 25, 2004

NOTICE OF ACTION TAKEN -- DOCKET OST 2004-18365

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Applicant: POLYNESIAN LIMITED

Date Filed: June 16, 2004, as supplemented by letter dated July 20, 2004, and by letter dated August 18, 2004, and as amended September 15, 2004, and as supplemented by letter dated October 25, 2004.

Relief requested: Exemption from 49 U.S.C. section 40109(g) to permit the applicant to carry persons, property and mail, between Pago Pago, American Samoa, and the Manu'a Islands, American Samoa, for a period of 30 days beyond October 24, 2004. The applicant asserts that no U.S. carrier currently conducts any intra-American Samoa passenger or cargo operations (Village Aviation having suspended intra-island cargo service on September 30, 2004), and that American Samoan passengers and shippers need its proposed services to prevent strandings, and to carry medicines, perishable items and other time-sensitive cargo.

Applicant representative: Charles F. Donley II, 202-626-6840 DOT analyst: Allen F. Brown, 202-366-2405

Polynesian Limited served its supplement (filed October 25, 2004, in this Docket) on those U.S. carriers having the potential to conduct these intra-American Samoa passenger services. The applicant advised us that each carrier indicated that it did not have aircraft available to conduct the proposed operations and had no comment or did not oppose grant of the requested authority through November 23, 2004.

Previous awards in this Docket: On June 23, 2004, we granted Polynesian Limited authority to carry persons and their accompanying baggage between Pago Pago and the Manu'a Islands through July 26, 2004, and deferred action on the remainder of its original June 16 request (that is, to carry persons, property and mail within American Samoa through September 26, 2004). On July 23, 2004, we granted Polynesian Limited authority to continue this operation for an additional 30 days, that is, through August 25, 2004, and deferred action on the remainder of its June 16 application. On August 23, 2004, we extended the applicant's authority through September 24, 2004, and, on September 22, 2004, extended the exemption through October 24, 2004.

Statutory Standards: Under 49 U.S.C. section 40109(g), we may authorize a foreign air carrier to carry commercial traffic between U.S. points (*i.e.*, cabotage traffic) under limited circumstances. Specifically, we must find that the authority is required in the public interest; that because of an emergency created by unusual circumstances not arising in the normal course of business the traffic cannot be accommodated by U.S. carriers holding certificates under 49 U.S.C. section 41102; that all possible efforts have been made to place the traffic on U.S. carriers; and that the transportation is necessary to avoid unreasonable hardship to the traffic involved (an additional required finding, concerning emergency transportation during labor disputes, was not relevant here).

DISPOSITION

Action: Approved.

Action date: October 25, 2004

Basis for approval: Taking into account the current record, including that no U.S. carrier currently conducts any intra-American Samoa passenger or cargo operations, we are granting Polynesian Limited's request to carry persons, property, and mail, within American Samoa, for a period of 30 days, that is, through November 23, 2004, or until five days after a U.S. carrier initiates intra-American Samoa passenger or cargo operations, whichever occurs first. We are deferring action on the remainder of the applicant's request in this Docket, that is, to continue to conduct passenger and cargo operations beyond November 23, 2004, through December 23, 2004.

In acting favorably on this unopposed request for extension of emergency cabotage authority, we find that Polynesian Limited's request to operate for a period of 30 days, meets all the relevant criteria of 49 U.S.C. section 40109(g) for the continued grant of an exemption of this type, and that such favorable action continues to be required in the public interest. The absence of U.S. carrier passenger and cargo services (following the late March 2004 suspension of passenger service by Inter Island Airways and the late September 2004 cessation of cargo operations by Village Aviation) continues, and, in the circumstances presented, clearly continues to constitute an emergency created by unusual circumstances not arising in the normal course of business. In addition, the record in this case indicates that there still is no U.S. carrier able at this time to provide passenger or cargo lift necessary to meet the needs of American Samoa, a community uniquely dependent on air transportation. Further, in our view, the conduct of the passenger and cargo services proposed by Polynesian Limited is required to prevent undue hardship to the residents of American Samoa.

Given these circumstances, we find that the standards for grant of emergency cabotage authority continue to have been met, and that grant of the authority requested by Polynesian Limited, through November 23, 2004, as conditioned, with deferral on the remainder of its request (to operate beyond November 23, through December 23, 2004), is warranted.

As provided in 49 U.S.C. section 40109(g), we will review this exemption near the end of this 30-day term to see if the unusual circumstances that established the need for the exemption still exist, and will be prepared to decide at that time whether the situation warrants extension of this authority for an additional term.

Finally, we find that the applicant is qualified to perform the authorized operations.

Except to the extent exempted/waived, this authority is subject to our standard exemption conditions (attached).

Action taken by: **Karan K. Bhatia**
 Assistant Secretary
 for Aviation and International Affairs

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FOREIGN CARRIER EXEMPTION CONDITIONS

ATTACHMENT

In the conduct of the operations authorized, the foreign carrier applicant(s) shall:

- 1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- 2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Principal Security Inspector (IPSI) to advise the IPSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- 3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- 4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- 5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- 6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- 7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- 8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- 9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- 10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- 11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.

05/2004